

C O M M E N T S

# Courts Shed Light on the Application of CERCLA's Bona Fide Prospective Purchaser Defense

by Charles S. Warren and Toni L. Finger

Charles S. Warren is a partner and Toni L. Finger is Special Counsel at Kramer Levin Naftalis & Frankel LLP. Mr. Warren chairs the firm's Environmental Law Department, of which Ms. Finger is a member.

Purchasers who knowingly take title to real property found to be contaminated with hazardous substances during pre-purchase due diligence may be subject to liability for remediation costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),<sup>1</sup> unless those purchasers are able to establish CERCLA's bona fide prospective purchaser defense (the BFPP Defense).<sup>2</sup> Prior to the enactment of CERCLA's Small Business Liability Relief and Brownfields Revitalization Act Amendments on January 11, 2002, purchasers of contaminated property generally could avoid CERCLA liability only if they qualified for the more limited "innocent-landowner" defense, which is unavailable to purchasers who have knowledge or reason to know of the contamination at the time of purchase.<sup>3</sup> The BFPP Defense, however, allows purchasers of contaminated property to avoid CERCLA liability, even if a purchaser has such knowledge, as long as the contamination occurred prior to their period of ownership.<sup>4</sup> Until recently, there was little case law discussing the BFPP Defense in detail. Finally, however, two recent federal court decisions have shed some light on how a purchaser can qualify for this CERCLA defense. This Comment looks at these two decisions and how they may impact parties who knowingly purchase contaminated property with the intent of qualifying for the BFPP Defense.

To qualify as a "bona fide prospective purchaser" under CERCLA, the purchaser must have taken title to the property after the date the BFPP Defense was enacted in 2002, and must establish by a preponderance of the evidence that: (1) the disposal of hazardous substances occurred

prior to acquisition of the facility; (2) "all appropriate inquiry"<sup>5</sup> was made into the previous ownership and uses of the facility; (3) legally required notices were provided with respect to hazardous substances found at the facility; (4) reasonable steps were taken to stop any continuing releases, prevent any threatened future releases, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance; (5) full cooperation and access is provided to those persons authorized to conduct response actions or natural resource restoration at the facility; (6) any land use restrictions relied on in connection with the response action have been complied with and the effectiveness or integrity of any institutional control employed in connection with a response action has not been impeded; (7) any information request or administrative subpoena issued under CERCLA is complied with; and (8) the person seeking to assert the defense is not potentially liable for response costs at the facility or affiliated with any other person that is potentially liable for response costs at the facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (excluding any contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed).<sup>6</sup> Several of these elements were reviewed in two recent federal court decisions.

In *3000 E. Imperial, LLC v. Robertshaw Controls Co.*,<sup>7</sup> the U.S. District Court for the Central District of California examined whether the current property owner, 3000 E. Imperial LLC (Imperial), satisfied the fourth element of the BFPP Defense listed above by taking reasonable steps to stop any continuing or threatened releases of hazardous substances at the subject property. In that case, Imperial

1. 42 U.S.C. §9601-9675, ELR STAT. CERCLA §§101-405.

2. 42 U.S.C. §9607(r)(1).

3. See 42 U.S.C. §§9601(35)(A)(i) and 9607(b)(3).

4. 42 U.S.C. §9607(r)(1). CERCLA provides that a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on their status as an owner or operator under CERCLA §107(a)(1) shall not be liable as long as the bona fide prospective purchaser "does not impede the performance of a response action or natural resource restoration." *Id.*

5. The standards for "all appropriate inquiry," which are set forth in the U.S. Environmental Protection Agency's (EPA's) regulations at 40 C.F.R. §312, establish the standards for conducting a Phase I site assessment to assess the likelihood of contamination at a property.

6. See 42 U.S.C. §§9601(40)(A)-(H).

7. No. CV 08-3985 PA, 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).

brought an action against Robertshaw Controls Company (Robertshaw), the successor-in-interest to a former site owner that operated an aircraft and missile valves manufacturing plant at a Lynwood, California, site. Imperial sought, among other things, cost recovery and declaratory relief under CERCLA due to contamination in two areas of the property, one of which was an underground storage tank (UST) nest that had been installed by Robertshaw's predecessor in 1942. Several months after purchasing the property in November 2006, Imperial had the contents of the USTs sampled. That sampling event detected the presence of trichloroethylene (TCE), a hazardous substance under CERCLA. Imperial had the contents of the USTs removed and placed into 55-gallon drums, which were taken away for disposal. Two years later, in 2009, Imperial excavated and removed the USTs.

Robertshaw brought a counterclaim against Imperial for cost recovery and contribution under CERCLA, since Imperial was the current owner of the property and a potentially responsible party (PRP) under CERCLA. Imperial, in turn, asserted the BFP Defense. Robertshaw challenged Imperial's status as a BFP by arguing that Imperial did not exercise "appropriate care" to stop any continuing releases at the site, because it unreasonably waited two years after it purchased the property to excavate the two leaking USTs.<sup>8</sup> The district court disagreed. Since Imperial had the USTs emptied soon after learning they contained hazardous substances, the court found that Imperial had taken steps to stop any continuing leak or to prevent any future leaks of TCE from the USTs, and that it was not unreasonable for Imperial to remove the contents of the USTs and leave the USTs in the ground, since they had been emptied.<sup>9</sup> The court also rejected Robertshaw's argument that the USTs should have been removed in 2007 to prevent the possibility of surface water infiltration, which could mix with any TCE left in the USTs and leak into the ground, because Robertshaw had not provided any evidence suggesting why Imperial would have had reason to believe the USTs were not completely emptied of TCE in 2007. Thus, the court found that Imperial had taken reasonable steps to ensure that there would not be any continuing releases at the site and prevent future releases.<sup>10</sup>

In *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*,<sup>11</sup> however, the U.S. District Court for the District of South Carolina found that the plaintiff, Ashley II of Charleston (Ashley), had not taken reasonable steps to prevent the release of hazardous substances at the subject property and had failed to satisfy several other elements of the BFP Defense. Ashley, a brownfield site owner, purchased a large portion of a contaminated Charleston, South Caro-

lina, site in 2003 and a smaller portion of the site in 2007 from two different parties. Ashley later brought an action against PCS Nitrogen Inc. (PCS), the successor-in-interest to one of the former site owners that had previously operated a fertilizer granulation plant at the site, seeking to recover remediation costs under CERCLA. PCS, in turn, filed a contribution claim against Ashley and several other parties. Ashley asserted a BFP Defense. In determining whether Ashley could avail itself of the BFP Defense, the court went through each of the eight factors enumerated in the statute.<sup>12</sup> The court found, however, that Ashley failed to meet its burden of proving several of these elements.<sup>13</sup>

The court found that Ashley failed to prove the first required element: that all disposal of hazardous waste occurred before Ashley acquired the site.<sup>14</sup> In 2008, Ashley demolished several buildings at the site and left certain cement pads, cracked sumps, trenches, and underground pipes in place that contained hazardous substances. The cracked sumps filled with rainwater, possibly leading to a release. Because Ashley failed to test under the concrete pads, sumps, or trenches to see if the soil beneath was contaminated, Ashley could not prove that no disposal had occurred during its ownership.<sup>15</sup> Further, the court found that Ashley did not exercise appropriate care to prevent releases of hazardous substances at the site, because Ashley failed to clean out, cap, fill, or remove the sumps at the time the buildings were demolished, leaving the sumps exposed to the elements and potentially exacerbating conditions at the site. In addition, the court found that Ashley failed to prevent a debris pile from accumulating on the site, did not investigate the contents of the pile or remove it for over a year after it acquired the property, and failed to maintain the required cover at the site to prevent the spread of contamination.<sup>16</sup> Based on these failures, the court found that Ashley had not exercised appropriate care with respect to hazardous substances found at the facility.<sup>17</sup>

Lastly, the court found that Ashley had failed to establish the eighth element: that it was not a PRP or affiliated with any other person that is potentially liable for response costs through a direct or indirect contractual relationship.<sup>18</sup> Because Ashley was the owner of the property where hazardous substances were currently leaching through the soil, the court found that Ashley was, in fact, a potentially responsible party. In addition to being a PRP itself, the court also found that Ashley had an "affiliation" with the prior site owners that precluded its application of the BFP Defense. As part of the sale transaction, Ashley provided the then-owners of the property with indemnifications and

8. *Id.* at 11.

9. *Id.* at \*12.

10. *Id.*

11. No. 2:05 cv-2782-MBS, 2010 WL 4025885 (D.S.C. Oct. 13, 2010).

12. *Id.* at 54-57.

13. *Id.* at 57.

14. *Id.* at 54.

15. *Id.*

16. *Id.* at 55.

17. *Id.* at 56.

18. *Id.* at 57.

releases, whereby Ashley agreed to indemnify and release them from environmental liability for contamination at the site, including CERCLA liability. Because of these indemnifications and releases, Ashley attempted to persuade the U.S. Environmental Protection Agency (EPA) from taking any enforcement action against the prior owner to recover response costs at the site, by arguing that Ashley would ultimately be responsible for the expenditures, which would discourage its future development efforts at the site.<sup>19</sup> The court found, however, that in indemnifying these parties, Ashley took the risk that the prior owners might be liable for response costs. Moreover, Ashley's efforts to discourage EPA from recovering response costs covered by the indemnity revealed the sort of affiliation that the U.S. Congress intended to discourage. Thus, the court found that Ashley failed to meet its burden of establishing the BFPP Defense and was liable for an equitable share of the response costs.<sup>20</sup>

These two decisions will have several impacts on prospective purchasers seeking to knowingly purchase con-

taminated property and qualify for the BFPP Defense. First, as a result of the ruling in *Ashley II of Charleston LLC*, prospective purchasers may hesitate to provide environmental indemnities to sellers, or else they may risk being viewed as an affiliate of a PRP and lose their ability to qualify for CERCLA's BFPP Defense. Second, prospective purchasers seeking to qualify for the BFPP Defense are on notice that they will have to take affirmative actions to ensure that there will be no releases of hazardous substances during their ownership of the site. This may include doing soil and groundwater sampling to determine whether there are any existing conditions or contamination sources on a site that could result in a hazardous substance release after they acquire ownership of the site, and remediate or remove any such conditions or contamination sources, if present. Lastly, these decisions will make it more difficult for prospective purchasers to use the BFPP Defense and will require more work than anticipated when the BFPP Defense was enacted.

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19. *See id.* at 30.

20. *Id.* at 57.